pension companies with $300 billion in assets. The U.S. Army administered the SBP military insurance policy. Federal statutes established by the U.S. Congress created and regulated the SBP. 10 U.S.C., Sections 1447-1452.

Immediately after Col. Lammers death, the officials at TIAA/CREF quickly processed the paperwork and started sending the petitioner monthly annuity payments by the end of October 1998. By contrast, the U.S. Army officials secretly cancelled the petitioner's irrevocable beneficiary status as the "survivor" of the SBP and sent nothing.

With no written notification from the U.S. Army, the petitioner traveled to Ft. Leavenworth, Kansas, on April 8, 1999. She then proceeded to the headquarters of Defense Finance and Accounting Services ("DFAS") in Cleveland, Ohio, and stayed there for the month of November 1999. Although the petitioner requested a hearing at both locations, U.S. Army officials refused to meet with her.

The petitioner was told to contact a military agency, known as the Army Board for Correction of Military Records ("ABCMR"). Over the next five years from 1999-2004, the petitioner carried on an extensive correspondence to explain the complexities of the incomplete divorce case. According to the petitioner, the U.S. Army's reliance upon the "person" of the petitioner after the interim *Judgment of Divorce* was irrelevant. Rather, she maintained that the issue was the "property" of the petitioner. The SBP immediately vested after the *Judgment of Divorce* and remained hers to claim absolutely four years later, as the survivor beneficiary, when Col. Lammers' demise preceded any divorce court order or settlement agreement to divide the marital assets.

After the Advisory Board of the ABCMR denied the petitioner's DD Form 149 application on February 7, 2003, she accepted the offer of this military agency to submit any

new evidence for reconsideration. The petitioner prepared a 146-page *Memorandum of New Evidence.* It included thirteen pieces of evidence, a full explanatory text and nine footnotes. In September 2003, the petitioner mailed this document to Carl W.S. Chun, director of the ABCMR ("defendant Chun"). She also sent a copy of this *Memorandum* to six senior officers in the U.S. Army.

On January 28, 2004, the petitioner filed a *pro se* complaint at the U.S. District Court for the Eastern District of Virginia in Alexandria. She named seven U.S. Army defendants, including Carl W. S. Chun and six other senior officers of the U.S. Army in their official capacity. Her complaint alleged U.S. Army violations of the Fifth and Fourteenth Amendments, the "liberty interest" guaranteed in the Preamble of the U.S. Constitution, federal statutes governing of the SBP military insurance annuity and the Administrative Procedure Act. 5 U.S.C., Section 706 (2)(6) As a remedy, the petitioner requested the District Court to order her reinstatement as the "irrevocable" SBP beneficiary with monthly payments retroactive to September 1998 on the basis that the ABCMR had acted in an arbitrary and capricious manner and abused its discretion. Due to financial problems related to housing in Washington D.C. and the need to raise funds to pay the court fees, the petitioner returned to an expanded amended complaint on July 19, 2004. She continued to represent herself *pro se.*

The Court received all papers from both parties on November 2, 2005. Then, on November 5, 2005, the Honorable Gerald Bruce Lee ("Judge Lee") held a hearing to consider the motion of the U.S. Army to dismiss and for summary judgment. The petitioner complained about the "defective" administrative record. When Judge Lee asked counsel for the U.S. Army if his client had ever given the petitioner a notice of policy cancellation, Dennis C. Barghaan, Jr., Esq. ("Mr. Barghaan") had to answer "No."

Mr. Barghaan announced that the *Estate of Agliata v. Agliata*, 589 NY 2d 236 (Supp. 1992), 155 Misc. 2d 385 (3rd Dept.) was the controlling case law precedent for the U.S. Army. Having not read this case prior to the hearing, the petitioner could not challenge it.

Finally, Judge Lee stated that his federal court did not have jurisdiction over the petitioner's case. But he was reassuring. The "government" (the precise source not mentioned in the transcript) had suggested to Judge Lee that "there may be another way to obtain what you really want which is some kind of claim against the estate of Colonel Lammers." Judge Lee recommended that the petitioner start a new action in the courts at New York State.

At the end of the hearing, Judge lee observed:

> THE COURT; ... it sounds like for whatever reason you've closed off the option of going back to the New York Court. (R at 571)

Immediately after the hearing, the petitioner went to the Law Library at the Madison Building, Library of Congress, to find *Agliata*, the controlling case touted by Mr. Barghaan. On November 17, 2004, Judge Lee issued his *Final Judgment* and *Memorandum Order* wherein he granted the U.S. Army's motion to dismiss and for summary judgment. (App. 5a-18a)

3. Sub-Statement: "for whatever reason"

Far too banal is the preceding *Historical Background* to even remotely qualify for the government's label, "extraordinarily-unique circumstances," as assigned by the

U.S. Department of Justice. Below the one-dimensional surface of the preceding statement lies a complex substrata of unconstitutional court procedures, fraud and attempted cover-ups. This substrata clarifies those "whatever reasons" to which Judge Lee referred at the hearing.

Defendant Chun at the ABCMR mined this substrata to find nuggets of information that subsequently skewed the agency's Record of Proceedings dated July 1, 2004. Instead of conducting a one-dimensional analysis of the federal statutes that governed the SBP, he irresponsibly distorted information from this substrata to make defamatory, libelous statements, Thus distracted, defendant Chun, charged with compiling an administrative record of the ABCMR with "fairness" and "relevance," instead produced an analysis that shattered the integrity of his agency.

The 1994 jury trial divorce was a hoax. On October 4, 1994, Mark S. Helweil, Esq., ("Mr. Helweil") stood before the six jurors. An experienced criminal lawyer and former prosecutor, Mr. Helweil represented plaintiff Col. Lammers as a replacement attorney. During his summation for the plaintiff, Mr. Helweil gave the jurors these instructions:

> HELWEIL: ... therefore, you have not heard any evidence from Mrs. Lammers. Her questions, comments, her opening statement is not evidence. The only evidence that you've heard in this case, that you have to base your decision upon, is the the testimony of Mr. Lammers. (App. 19a-22a)

For her defense at this jury trial, the petitioner, proceeded *pro se*. She was ready, well in advance, to raise the issue of appalling educational abuse of her two sons by members of the Rockefeller Family. Previously, on April 21, 1994, she presented the Honorable Lewis R. Friedman ("Judge Friedman") with an official Subpoena Duces Tecum. Judge

Friedman signed it. The petitioner immediately served this subpoena on C. Hooker O'Malley, a nephew of Mr. and Mrs. John D. Rockefeller III, who was the father of the petitioner's two sons by her first marriage.

Such a subpoena triggered the involvement of lawyers paid to protect the Rockefeller interests in any lawsuit. Subpoenaed documents, letters and financial statements would implicate both Rockefeller Family lawyers and family members in the petitioner's objective presentation of evidence to prove eighteen years of unrelenting educational and psychological abuse that had placed an enormous financial strain on the her second marriage to Col. Lammers.

However, as Mr. Helweil told the jurors on October 4th, Judge Friedman did not grant the petitioner a single word of testimony or to the opportunity to present any evidence.

"That is absurd," replied Professor Stuart Hampshire, a renowned scholar on jurisprudence who had just delivered the Tanner Lecture Series on Human Values at Harvard University on October 26, 1996. He assured the petitioner that such a divorce trial could not take place in an American court of law. "There must be two sides or it is not a trial."

Professor Hampshire was wrong, and the petitioner owned an official copy of the jury trial transcript to prove it.[2]

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[2]The petitioner was absent on October 4, 1994, when Mr. Helweil delivered his instructions to the six jurors. No one anticipated that the petitioner would return to New York City. Nor, burdened with court-ordered indigency, would she ever be able to pay the $5,000-$7,000 cost for the 960-page transcript. Sleeping in homeless shelters and standing on breadlines, the petitioner did manage to return and filed a *pro se* appeal at the Appeliate Division: First Department. In May 1995, the five appellate judges granted her motion, as an appellant proceeding *in forma pauperis*, to receive a free copy of this entire transcript.

The professor failed to understand the dynamics of a big-city court system where well-connected judges could be bought indirectly by donations to government instrumentalities, known as charitable corporations. Nor did the professor fathom the long reach under the table where the pressures of influence, wealth and power manipulated court agendas.

It was not enough for Judge Friedman and Mr. Helweil to finesse a one-sided jury trial during *ex parte* conferences. The petitioner's legal experience "in the rough" posed a significant problem. Since 1986, she had a record of three successful appeals and eight wins in the lower courts without a lawyer. On appeal, most recently she had disqualified Derek A. Wolman, Esq., the original lawyer representing Col. Lammers in the divorce action. She had to be silenced. (App. 23a-30a)

On October 31, 1994, with no due process, Judge Friedman sprang a trap that caught the petitioner completely by surprise. Knowing that the petitioner relied completely upon the monthly *pendente lite* support payments that he had ordered on August 9, 1993, Judge Friedman cancelled them entirely. Effective that day at the end of the month when she anticipated her next payment on November 1, 1994. his order left the petitioner without any funds whatsoever and dependent upon a rented van for her emergency housing.

Judge Friedman had reviewed the physicians' reports. Knowing that the petitioner relied upon daily expensive prescription medication to relieve her life-threatening respiratory condition, Judge Friedman effectively stopped this 100% medical assistance he had ordered on August 9, 1993, again with no due process.

Finally, the petitioner's 80-year old mother, Nanneen Prendergast Rebori, was unwell and totally dependent upon her daughter's care. Due to her advanced years and failing

health, the petitioner's mother was to suffer most. When Judge Friedman issued his harsh order that imposed extreme financial and living hardships over an extended period of time, he deliberately set in motion the causes that led to her death on June 4, 1996. (Note 9, AR at 033)

With all her monthly income and 100% medical assistance cancelled, the petitioner arrived at the court on November 1, 1994, to receive the interim *Judgment of Divorce*. This document was silent on the distribution of any marital financial assets, including the SBP. They were to be the subject of the second half of the bifurcated divorce trial.

Back in New York City by January 1995, the petitioner pushed forward with her objective to schedule the final hearing for the equitable distribution of marital assets as soon as possible. On September 5, 1995, the petitioner personally served Mr. Helweil with her *Statement of Proposed Disposition* of marital assets. Since Judge Friedman had ordered that "no adjournment of the final hearing" would be permitted, the petitioner also handed Mr. Helweil a 148-page confidential transcript that she planned to introduce as evidence at the final hearing. Reserved strictly for him, the petitioner did not include this transcript as part of the record that she filed with the court.

This transcript included convincing evidence to prove Col. Lammers' "breach of contract about wife's law school support." By January 1992, the petitioner had completed one year at Cardozo School of Law (Yeshiva University) in New York City. With "two more years to complete law school, plus 6 months to complete her exams," the petitioner was asking the divorce court to award her "maintenance" under the section (d)(5) concerning "lost or reduced earning capacity." A check written by Col. Lammers contained notations that proved the law school contract existed. It had been introduced into evidence at the hearing. (AR at 075)

The petitioner was the architect of her own undoing. She had given Mr. Helweil the confidential transcript of her commitment hearing that took place on June 2 and 3, 1992. New York State officials had petitioned the county court in Canton, St. Lawrence County, for the "long-term involuntary commitment" of Col. Lammers' wife. With this transcript, Mr. Helweil had in his hand a second way to silence the petitioner. With the words, "psychiatric institution," he was able to handily discredit anything that she said.[3]

Mr. Helweil attached the full 148-page commitment hearing transcript again and again as an exhibit in his court papers from 1995-1997. The petitioner remained silent. Ever hopeful the final hearing for the divorce would take place soon, she ignored every reference that Mr. Helweil made to this transcript. The audiences that Mr. Helweil addressed during those two years included the five appellate judges at Oral Argument on March 13, 1996. These judges did not know that the petitioner had paid Clarence Gratto, Esq., in advance, to represent her at the commitment hearing. When Mr. Gratto mysteriously failed to arrive on the appointed day of the hearing, the petitioner was forced to represent herself on a *pro se* basis, although she was unprepared and had no knowledge whatsoever about the complex mental health laws in New York State. Instead, she filled the commitment hearing transcript with explicit testimony about the educational abuses that her sons had suffered at the hands of the Rockefeller Family, prominent and powerful in New York politics, finances and culture.

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[3]During spring break 1992, the petitioner traveled to Canada. Upon her return at the border crossing to St. Lawrence County, she told the U.S. border guards that she was homeless and returning to law school for her moot court examination. Assuming this to be delusional fiction, they drugged the petitioner into a state of unconsciousness and locked her up in a mental institution. For four months Col. Lammers had cut off all the income he had promised her if she would re-enroll in law school.

At the end of the commitment hearing on June 3rd, the Honorable Kathleen Rogers, an acting judge, had ruled that Col. Lammers' wife was a danger to society and to herself based upon her own admission that (a) she was homeless and (b) she had been sick three times in the past eight months due to eating tainted food. However, as soon as the petitioner took up the cudgel of appeal, unknown officials at the county court had backed down. But it was too late. She had failed all five law school exams. (App. 23a-25a)

In spite of the problems created by Mr. Helweil's repeated use of the commitment hearing transcript, the petitioner managed to schedule the final hearing for the distribution of marital assets before the Honorable Steven Liebman, Special Referee, on April 8, 1996. Aware of Judge Friedman's order that this hearing could not be adjourned, all parties were assembled in the office of the Special Referee. Mr. Helweil immediately asked for an adjournment. The official transcript records that the Special Referee granted his request. (AR at 081)

The New York State court officials continued to rebuff the petitioner as she renewed her efforts to schedule yet another final hearing. She sought the *pro bono* assistance of J. Owen Zurhellen III, Esq., who became her attorney of record. After months of patient effort, even he could not to arrange any kind of modest out-of-court settlement.

During autumn 1997, the petitioner decided the only way to end the divorce proceeding was to break her silence about the commitment hearing. Titled *Exhibit A: Abuse of Court Power* © 1998, the petitioner wrote a 316-page transcript analysis using the topics of Professionalism, Legal Ethics and Fund-raising. (Note 8, AR at 029)

By March 1998, the petitioner's health had deteriorated to such a degree that the Social Security Administration

ruled she was "totally disabled and unable to work." She was subsisting on a monthly disability check of $418, plus $55 in food stamps and Medicaid.

Raoul Lionel Felder, Esq., the celebrity lawyer in Manhattan, stepped into the breech in April 1998. On a *pro bono* basis, he tried to negotiate an out-of-court settlement, without the slightest hint of success. Then, his firm conducted lengthy research to get the divorce proceeding restored to the court calendar. Since Judge Friedman had died on February 18, 1998, the Honorable Eileen Bransten ("Judge Bransten") was the replacement judge.

Running the *pro se* gauntlet at the end of April 1998, the petitioner wrote the *Order to Show Cause* for this final hearing and attached *Exhibit A: Abuse of Court Power.* Then, she filed it in person with the law clerk to Judge Bransten as a matter of official court record, regardless of what might befall in the future.

The final hearing was scheduled for June 9, 1998. The petitioner relinquished her brief *pro se* status to Lindsay Nicely Feinberg, Esq., ("attorney Feinberg") who had agreed, at the last minute, to represent her at the final hearing without requiring a retainer in advance.

Judge Bransten began the hearing with a stern warning to attorney Feinberg. If the final hearing for equitable distribution of marital assets continued, she vowed she would rule that the petitioner must pay the $100,000 in legal fees that Mr. Helweil had billed to Col. Lammers. Furthermore, the final hearing had to be postponed. Attorney Feinberg had failed to file her notice of appearance with the court. No date was set for the continuation of this final hearing. It had yet to appear on Judge Bransten's court calendar when Col. Lammers died on September 22, 1998.

4. *Military Agency Acts Above the Law:*

Our armies are scattered to the four corners of the earth to promote the cause of democracy. Our emissaries transport themselves to distant capitols to champion the benefits of equal rights for women. Yet, here at home, this federal case provides convincing evidence about how the U.S. Army operates above the law and condones the subjugation of women to male domination and abuse.

Defendant Carl W.S. Chun ("defendant Chun"), director of the military agency known as the Army Board for Correction of Military Records, has operated in the substrata of unconstitutional court procedure, fraud, cover-up, abuse of discretion and libel against the Rockefeller Family.[4]

Defendant Chun refused to address the petitioner's sole issue: the U.S. Army's seizure or "taking" of her private property that vested absolutely upon the demise of Col. Lammers. Instead, he repeatedly deflected attention to the non-issue of "surviving spouse" about which there was no argument or disagreement. To insulate his distorted administrative record from court scrutiny, defendant Chun manipulated the civil court procedure of discovery. The six other defendants, all high-ranking officers in the U.S. Army including Secretary of Defense Donald H. Rumsfeld ("U.S. Army"), followed defendant Chun's lead down this crooked procedural path that is the antithesis of the high road established in constitutional and statutory law in the United States.

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[4]The military correction boards were established in 1946 by an act of the Congress of the United States. During the ensuing 60 years, the Army Board for Correction of Military Records has grown to include the review of more than 700 case issue categories for correction. As of October 15, 2004, psychiatric and mental health case issue categories numbered 22. In addition, homosexuality case issues numbered 24.

Represented by attorneys in the United States Department of Justice, the U.S. Army cancelled the 3-month discovery period originally ordered by the District Court. It engaged in premature *ex parte* communications with Judge Lee, thus prejudicing the outcome of the petitioner's case in favor of the U.S. Army even before the initial complaint, answer and reply papers had been submitted to the court.

Defendant Chun introduced into evidence a defective administrative record for his military agency. Almost one year after the petitioner submitted her *Memorandum of New Evidence*, defendant Chun mailed her the second denial on July 27, 2004. Therefore, the petitioner had no opportunity to respond to this denial's distortion of the facts because she had already served her amended complaint on defendant Chun on July 19, 2004. With this precision timing of the mail delivery, the administrative record included only one side of the issues raised by defendant Chun in his second denial. By omitting of the petitioner's letters, documents and booklets from the administrative record, the ABCMR consistently sought to erase evidence that proved the petitioner had asserted her right to have an administrative hearing where she would have had an opportunity to respond in person. This denial of a hearing and deliberate record omission occurred because the military agency followed a policy of deliberately acting above the law. Ignoring even the requirement to give notice of its SPB cancellation, the U.S. Army disregarded the constitutional protections for vested private property in the Due Process Clause of the Fourteenth Amendment and the Fifth Amendment.

Discovery is a fundamental right that preserves equity of process in a democratic court. Therefore, on October 5, 2005, the civil docket verifies that the federal court ordered a 3-month period of discovery for both parties that would extend until February 11, 2005, followed by a pre-trial conference scheduled on February 17, 2005.

In order to operate above these rules of civil procedure, the U.S. Army took unfair advantage of the fact that the petitioner was located at her legal address in northern Vermont. On September 30, 2004, the U.S. Army certified the service of its answer, memorandum of law and administrative record on the petitioner in Vermont. Then, the U.S. Army circumvented the petitioner's possible attendance at this *ex parte* conference by scheduling it for October 20, 2004 before her answering papers were due. This conference date was nine (9) days before the petitioner timely filed her reply and memorandum of law on October 29, 2004. In addition, it was thirteen (13) days before the U.S. Army timely filed its reply on November 2, 2004. With all the initial papers filed by both parties on this latter date, the petitioner's final agency review case was ready to move forward. But, the U.S. Army had already acted precipitously to override the court order of October 5, 2004, and to negate civil procedure rules authorizing discovery practice.

Only the petitioner stood to gain from discovery. Over the five-year period from 1999-2004, she had engaged in extensive correspondence with the U.S. Army. In good faith, she had submitted every personal and official document in her possession. In addition, the petitioner had obtained five highly relevant certified court documents from the *Lammers'* divorce case in the Archives Room of the Supreme Court of New York County. Yet, the ABCMR excluded these relevant court documents from its administrative record.[5]

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[5]The U.S. Army provided this description of its administrative record: "Defendants have filed the administrative record before the ABCMR with this memorandum, and the following factual discussion is drawn exclusively from that record. Accordingly, this Court should give no substantive weight to exhibits filed by plaintiff (petitioner) with her amended complaint." *Memorandum of Law In Support of Defendant's Motion to Dismiss and for Summary Judgment*, September 30, 2004, (R at 210, page 6)

The petitioner identified the five certified court records as Exhibits AA-EE in her amended complaint filed on July 19, 2004. But, the U.S. Army omitted them from its incomplete administrative record filed on September 30, 2004.

In contrast, defendant Chun had not supplied a single new official document to substantiate either the first ABCMR denial (February 7, 2003) or its second denial (July 27, 2004) of the petitioner's request for reinstatement as the SBP beneficiary. He failed to provide Col. Lammers' application to name the petitioner as the irrevocable beneficiary in 1978. Nor was there any record of the official monthly deductions made from Col. Lammers' retirement pay to keep the SBP policy active. Nor was there any letter from Col. Lammers requesting the cancellation of the petitioner's SBP status as the irrevocable beneficiary. Not a single piece of official U.S. Army paperwork or correspondence can found in its administrative record to provide a paper trail of its high-handed seizure of the petitioner's property in defiance of the established federal statutes and constitutional amendments.

Instead, defendant Chun introduced a letter from Col. Lammers that gave rise to allegations of fraud. Sent to the Defense Finance and Accounting Services ("DFAS"), the letter was dated May 3, 1995. Bill Tyminski at DFAS had verified that the petitioner's beneficiary status ended when the interim Judgment of Divorce was issued on November 1, 1994. Yet, more than seven months later, Col. Lammers wrote DFAS that she was still his beneficiary. Both statements could not be true. Discovery was the obvious procedure to increase the amount of official information available in the insurance records kept by the U.S. Army in its administration of the SBP pension annuity.

When questioned by Judge Lee, the petitioner assured him that the U.S. Army had never consulted with her about its administrative record that would control all the evidence

both parties could present at the trial. Compiled on a strictly one-sided basis by the military agency that was her adversary, its administrative record denied the petitioner her due process rights to a fair trial.

In the second denial of the petitioner's request for reinstatement as the SBP beneficiary, Defendant Chun mined the substrata of this case for personal "family" nuggets, in violation of the APA regulations mandating "relevance" and "timeliness" in agency documentation. (AR at 001-005) First, by omitting the petitioner's opening page titled Foreward: "Allegiance to Duty," defendant Chun expunged the name of every member of her family who had served in the Armed Forces from the administrative record. (App. 31a) Then, he pilloried the petitioner's mother by dragging her from the obscurity of Footnote 9 into the glare of his maximum coverage. In no way was the petitioner's mother relevant to the issue of the petitioner's SBP insurance annuity. She had died in 1996. (AR at 030)

Finally, turning his attention to the defamation of the petitioner, defendant Chun stumbled into a First Amendment violation, known as libel. Attempting to add verbal window-dressing to the damning words, "psychiatric institution," defendant Chun made libelous statements that falsely linked the Rockefeller Family as the proximate cause of the petitioner's 48-day involuntary incarceration in a mental hospital when she was a full-time law student in 1992. Defendant Chun had only to read the petitioner's *Memorandum of New Evidence*: "William Lammers, through the manipulation of the Canadian border guards, caused my car to be intercepted. I found myself locked up in an upstate mental institution." The Rockefellers had absolutely no connection with this act to incarcerate the petitioner in a psychiatric institution. They received only a brief reference to explain their relationship to petitioner's book, *Exhibit A: Abuse of Court Power*. (AR at 029, note 8)

Defendant Chun decided to lean upon Note 8 in order to do maximum damage with just two words, "psychiatric institution," and thus undermine the petitioner's credibility, character and reliability as she proceeded to represent herself *pro se*. While holding the petitioner up for degrading scrutiny on this competency issue, defendant Chun neglected to explain that Col. Lammers deliberately sought the petitioner's involuntary incarceration in order to destroy her right to complete her law studies and to diminish her ability to be self-supporting in the future.

Col. Lammers was the product of a military tradition where spousal dissent is silenced in this harsh manner. He relied upon a patriarchal philosophy, mirrored in defendant Chun's decision to highlight this irrelevant issue where male-oriented authority flows down in a hierarchal descent. Archaic in nature, this rigid control system grants no independent rights to the petitioner, no fair trial, no due process and no freedom of speech. As a wife, she is chattel. In defiance of the law, what belongs solely to her can be seized as the exclusive property of the husband. In such an inflexible framework, if Col. Lammers did not want the petitioner to finish her law school education, it was his male prerogative to break his contract and leave her without funds after she had enrolled upon reliance of his proffered financial assistance. "Whatever it takes" is the slogan where laws are surrendered to military fiat. If libel works, then use it. Use obscure Notes 8 and 9. When defendant Chun endorsed this type of male superiority and family ridicule, he act upon his military bias against dissenting women guaranteed equality on the domestic home front and in an American court of law.

When the U.S. Army unconstitutionally denied the rights of the petitioner as the irrevocable beneficiary of the SBP, it moved up to a military promontory above the law to do so.

REASONS FOR GRANTING THE PETITION

I. THE AFFIRMATION OF THE FOURTH CIRCUIT IS IN DIRECT CONFLICT WITH PAST DECISIONS RENDERED BY THE FOURTH CIRCUIT, GIVING RISE TO INCONSISTENCY AND CONFUSION WHERE THE STABILITY AND SETTLED EXPECTATION OF CASE LAW PRECEDENTS REGARDING THE JURISDICTIONAL ISSUE OF ITS ESTABLISHED "DOMESTIC RELATIONS EXCEPTIONS" SHOULD PREVAIL.

This Court should grant the petition for a writ of certiorari because the standards established by the Fourth Circuit's "domestic relations exceptions" are marred by an alarmingly inconsistent Fourth Circuit affirmation in this case when compared with its several rulings in past cases that dealt with the issue of "domestic relations exceptions" in state versus federal jurisdiction.

The petitioner has no argument with three of the case law precedents set forth by the U.S. Army. Surprisingly, these three cases support the petitioner's assertion that this case qualifies for federal jurisdiction as asserted in her papers. These three cases do not provide rational support as case law precedents for the U.S. Army. Further, in permitting this inconsistent use, the Fourth Circuit casts into confusion its own settled standards and the standards of the Second Circuit in state versus federal jurisdiction.

The U.S. Army has relied upon *Raftery v. Scott*, 756 F.2d 335 (4th Cir. 1985) as its precedent for requesting that this case be transferred to state jurisdiction. Likewise, Judge Lee relies upon *Raftery* in his *Memorandum Order* where he then explains that "it is traditionally the province of state courts to decide questions of domestic relations law." (App.16a)

Both the U.S. Army and Judge Lee rely upon the wrong case precedent to support his ruling for state jurisdiction. Coming down squarely on the side of federal jurisdiction, the Fourth circuit decision in *Raftery* was a basis for reversal.

In *Raftery*, Judge Murnaham of the Fourth Circuit relied upon *Cole v. Cole*, 633 F.2d 1083 (4th Cir. 1980) for the standard of the "domestic relations exceptions." He reaffirmed that the federal courts have no origination jurisdiction to:

(1) grant a divorce
(2) award alimony
(3) determine child custody or
(4) decree visitation

The petitioner does not ask the federal court to adjudicate any of these four "domestic relations exceptions." Instead, her amended complaint deals solely with a single item of vested private property that is governed only by federal statutes, either directly stated or interpretative. 10 U.S.C., Sections 1447-1452. She is the sole irrevocable beneficiary. The SBP requires only final agency action in a federal court on the narrow standard defined by the Administrative Procedures Act ("APA"). 5 U.S.C., Section 706 (2)(A)

The case before the Court concerns only the disposition of vested private property that is governed by the Fifth and Fourteenth Amendments. The SBP military annuity does not qualify as any of the four "domestic relations exceptions" established in *Cole*, a seminal Fourth Circuit case or in *Raftery* that relies upon *Cole*. Therefore, the rulings in *Cole* and *Raftery* support the petitioner's argument for federal jurisdiction. By affirming Judge Lee's ruling for state jurisdiction, the Fourth Circuit created a confusion of standards because it disregarded *Raftery* and *Cole*, also Fourth Circuit cases that had already set established and settled precedents for federal jurisdiction. (App. 3a-4a)

The U.S. Army selects yet a third case from the Second Circuit that conflicts with the affirmation of the 3-judge panel of the Fourth Circuit. While arguing for state jurisdiction, the U.S. Army relies upon *Brissett v. Ashcroft*, 363 F.3d 130 (2nd Cir. 2004), an immigration case. After weighing the definitions in Domestic Relations Law in New York State, the federal jurists throw out Calvin Brissett's appeal to remain in the United States. At no point in the proceeding did the Second Circuit judges, Leval, Sotomayor and Wesley, ever hint at the possibility of turning the *Brissett* case over to the state court for alternative jurisdiction. They ordered Brissett, an alien, to be removed pursuant to the federal laws in 8 U.S.C., Section 1227. Again, the U.S. Army fails to explain how the decision in this federal case tried in the Second Circuit supports its argument for state jurisdiction. On the contrary, *Brissett* is the third case cited as precedent by the U.S. Army that, on the contrary, supports the petitioner's argument to keep this instant case in federal jurisdiction.

In the *Memorandum Order*, Judge Lee creates further confusion with his reliance upon yet another Fourth Circuit case. In *Diaz v. Diaz*, 568 F.2d 106 (4th Cir. 1997), wife Naomi has not even filed for a divorce. Therefore, she has no state court decision to justify her request, at the federal level, for alimony and child support. Since she fails on two counts of the "domestic relations exceptions," the Fourth Circuit is consistent in dismissing her complaint for federal jurisdiction. However, the Fourth Circuit acts in error when it affirms Judge Lee's reliance upon *Diaz*, a case whose decision is based upon a fact pattern that does not even remotely correspond to this present case. (App. 16a)

As the defendants in this case, the U.S. Army attempts to expand the petitioner's case into a hypothetical state action that inappropriately would embrace the distribution of all marital assets, seven years after the divorce case has abated.

"The government" presents this alternative course of action as a distracter to derail the narrow purpose of the petitioner's present lawsuit that focuses only upon the restoration of the SBP, a federal insurance asset that cannot be divided.

The petitioner requests that her single-item federal case challenging the denial of the Army Board for Correction of Military Records be remanded to the District Court. After constitutional due process procedures are ordered by this Court to provide for discovery and to ensure fairness, completeness and relevance in the compilation of the administrative record, the District Court's decision about the SBP military annuity, will be held to the enforcement of the APA agency guidelines.

II. A FEDERAL GOVERNMENT AGENCY IS OBLIGATED TO COMPLY WITH THE FIFTH AND FOURTEENTH AMENDMENTS THAT REQUIRE DUE PROCESS PROCEDURES, INCLUDING ADEQUATE OPPORTUNITY FOR DISCOVERY, IN ORDER TO PROTECT THE LIFE, LIBERTY AND PROPERTY RIGHTS OF THE INDIVIDUAL CITIZEN AND IS NOT PERMITTED TO INVOKE A STANDARD OF AUTHORITY SUPERIOR TO THE U.S. CONSTITUTION.

This Court should grant the petition for a writ of certiorari because the due process clause of the Fourteenth Amendment does not countenance such a swift passage from pleading to judgment in the moving party's favor where the non-moving party has a constitutionally protected "property interest." Since 1978, the petitioner, as the irrevocable beneficiary, has had an undisputed private property interest in the SBP military pension, protected by the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment. In *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011 (1970), plaintiffs (welfare claimants) are not required

to show that they would prevail on the merits before they are entitled to due process. Likewise, in *Mallette v. County Employees' Retirement System II*, 91 F.3d 630 (4th Cir. 1996), the disabled county employee has a property interest in her potential eligibility for disability retirement benefits. This interest entitles her to due process. In this case now before the Court, the petitioner has a property interest protected by monthly payments over a 17-year period. After issuance of the Judgment of Divorce on November 1, 1994, the SBP became a vested private property interest that belonged solely to the petitioner.

The U.S. Army selected *The Estate of Agliata v. Agliata*, 589 NY 2d 236 (Supp. 1992), 155 Misc. 2d 385 (3rd Dept.) as its controlling case. It rules that all marital property vests immediately after the court grants an interim judgment of divorce until such time as the court makes an equitable distribution. In this incomplete case, the court never made any ruling about the equitable distribution of marital assets. Therefore, following the precedent established in *Agliata*, the petitioner's SBP vested absolutely to her benefit upon the death of Col. Lammers on September 22, 1998.

In his *Memorandum Order* dated November 17, 2004, Judge Lee set forth a Standard of Review that is totally contrary to the actual review procedures followed in this case. (App. 12a-13a) While the six cases cited in the *Memorandum Order* provided time for discovery, the U.S. Army unilaterally cancelled the petitioner's discovery practice within days after the court had ordered, according to the civil docket, that such discovery should take place. Instead, the U.S. Army changed the court calendar to have its motion for summary judgment heard without discovery.

In *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99 (1957) the plaintiffs are black railroad employees who are granted discovery before any judicial decision is made. In *Mylan*

Labs, Inc. v. Matkari, 7 F.3d 1130 (4th Cir. 1993), a complex case reaching for global conspiracy status, several motions to amend are granted, including the second amended complaint that confused the record "virtually beyond analysis" and presented a host of new allegations. It can be assumed that the numerous parties were granted an opportunity for discovery over the many months of litigation before two different judges. Certainly, there is no rush to judgment. Again, in *Labram v. Havel*, 43 F.3d 918 (4th Cir. 1995) discovery is permitted under Maryland's procedural discovery laws. Justice White delivers the opinion in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505 (1968) with the words, "following discovery, petitioners move for summary judgment, pursuant to Rule 56." In *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348 (1986) the court grants the parties several years of discovery.

Finally, Judge Lee relies upon *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986) to set the parameters of his official Standard of Review. *Celotex* would appear an inappropriate selection when Judge Lee has reversed his original order and does not permit any discovery for the petitioner, as the non-moving party. Judge Rehnquist takes a strong stand against "railroading cases to an abrupt, untimely decision on summary judgment without discovery." He mandates a standard of review that contrasts strikingly with Judge Lee's standard used in the petitioner's case:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, **after adequate time for discovery**, against a party who fails to make a showing to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *(emphasis added)*

In the Standard of Review outlined by Judge Lee, he gives neither statutory provision nor case law precedent to justify the U.S. Army's abuse of discretion that led to the cancellation of discovery in this case. Instead, Judge Lee places the petitioner at an inequitable disadvantage in his decision to prematurely cancel all discovery.

Those "ends of justice," as described by Justice Black in *Hormel v. Helvering*, 312 U.S. 552, 61 S.Ct. 719 (1941) were sorely defeated by Judge Lee who ignored the conventional rules of practice and procedure. In so doing, Judge Lee totally sacrificed adherence to "the rules of fundamental justice." An administrative record of a military governmental agency is a powerful document. Like a gatekeeper, the agency has total control over the evidence that both parties are permitted to introduce at the final agency hearing. The APA regulation states

> ... the agency shall maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination. 5 U.S.C., Section 552a

The administrative record submitted by the U.S. Army failed on all four counts. More interested in defamation of the petitioner's character and in insults to her mother and family members, the ABCMR sacrificed accuracy, destroyed relevance, cancelled timeliness, and aborted any semblance of completeness. The mere fact that defendant Chun omitted (a) substantial amounts of the petitioner's documentation, (b) reduced the number of her written requests for a hearing, and (c) meandered through the substrata of irrelevant illegalities that had occurred during the incomplete divorce proceeding, renders the present administrative record far too prejudicial in favor of the U.S. Army to permit its use at trial.

III. THE DECISION OF THE FOURTH CIRCUIT TO AFFIRM THE FINAL JUDGMENT OF THE DISTRICT COURT ALLOWING SEIZURE OF VESTED PRIVATE PROPERTY BY A MILITARY GOVERNMENTAL AGENCY VIOLATES THE SUPREME COURT'S LANDMARK DECISION IN *CLEVELAND BOARD OF EDUCATION V. LOUDERMILL.*

This court should grant this petition for a writ of certiorari because the Fourth Circuit court has issued an opinion, through its affirmation of the judgment of the District Court, that undermines and violates the decision in *Cleveland Board of Education v. Loudermill*, 470 U.S. 543, 105 S.Ct. 1487 (1985). This petition presents three questions of constitutional law that are profoundly important. Their resolution by this Court is imperative in order to restore protections guaranteed in the Bill of Rights where they are endangered and to maintain these protections when they are threatened. In order to maintain the supremacy of the U.S. Constitution, this Court must address the issue of zealous officers in military agencies who would usurp control and operate above the law. The decision of the Fourth Circuit to affirm the final judgment of the District Court weakens the authority of the U.S. Constitution. It leads to further erosion of the Fifth and Fourteenth Amendments. It denies the constitutional rights of citizens who seek court protection to forbid illegal military seizure of their vested private property.

The U.S. Army has refused to acknowledge the "vested" status of the SBP as private property belonging to the petitioner after Judge Friedman issued the interim Judgment of Divorce on November 1, 2004. However, the U.S. Army has also failed to cite a single federal statute that authorized the "taking" or "recapture" of this vested SBP property without providing notice of the opportunity to be heard. During the long five-year stretch of time and with the professional fire-power of the legal staff at the DFAS offices

Cleveland, Ohio, no member of the U.S. Army has even been able to produce the proper legal citation for a nameless case of questionable relevance that director Bill Tyminsky paraphrased, out of context, in his decision on November 17, 1999. Nor has the U.S. Army pointed to a single federal statute that authorizes it to surreptitiously seize the petitioner's vested private property without the receipt of an official written settlement agreement or a divorce court order. 10 U.S.C., Sections 1447-1452

The U.S. Army turned the illegality of its "seizure" of the petitioner's SBP into a comedy of errors. At the hearing before Judge Lee, counsel for the U.S. Army introduced *Agliata* as its chosen authority to support its endorsement of state jurisdiction. In fact, that ruling protects absolutely the "vested" nature of all marital property, including the SBP. *Agliata* becomes the legal buttress that instead strengthens the position of the beleaguered petitioner. The vesting of the SBP property, in the absence of a court order, was the one issue the U.S. Army wanted to avoid. Yet, it surfaced irrepressibly at the hearing. With the case papers held in counsel's outstretched hand before Judge Lee, Mr. Barghaan emphasized the importance of *Agliata* as the U.S. Army's controlling case precedent in this action.

In *Agliata*, Justice Howe stated:

> Based upon the principles set forth in our Court of Appeals in Cornell, I conclude that the right to equitable distribution vests upon determination of a court that a judgment of divorce is to be granted. (citing *Cornell v. Cornell*, 7 N.Y. 2d 164, 196 N.Y.2d 98 (1959)

With this controlling case, the U.S. Army surrenders any justification for its illegal "taking" of the petitioner's SBP annuity.

The U.S. Army has propped up the "surviving spouse" argument as its legal camouflage. Yet, it fails to explain how changed status of "person" denies the petitioner's vested right to her property. What survived after the interim Judgment of Divorce was her property, vested and waiting for equitable distribution. Upon the death of Col. Lammers before any court decision regarding marital property, the SBP vested absolutely. The TIAA/CREF pension company required no new adjudication in a divorce court before it started the petitioner's survivor annuity payments in 1998. The U.S. Army chose to stonewall for seven years.

In its Final Judgment, the District Court relied upon *Agliata*, a judicial ruling that the petitioner's SBP military annuity is vested private property protected by constitutional amendments. Yet, this case contradicted Judge Lee's ruling that no material fact was at issue. Without allowing any time for discovery, he erroneously granted the U.S. Army's motion for a hasty summary judgment. Both the procedural conduct of this "railroaded" case in the District Court and the arbitrary acts of the U.S. Army to cancel discovery were abuses of discretion that challenged the power of the U.S. Constitution to mandate protections prior to the seizure of vested private property.

In *Cleveland*, Justice White of the Supreme Court held that employee complaints against the boards of education were sufficient to state a claim and defeat summary judgment. Then, then he proceeded to clarify any misconception about the nature of a constitutional guarantee:

> If a clearer holding is needed, we provide it today. The point is straightforward: the Due Process Clause provides that certain substantive rights – life, liberty, and property – cannot be deprived except pursuant to procedures. The categories of substance and procedures are distinct. Were the rule otherwise,

> the clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any more than life and liberty. The right to due process is conferred not by legislative grace, but by constitutional guarantee.

The tenured public employees in *Cleveland* sought notice and a predetermined opportunity to respond prior to their anticipated termination. Because these employees alleged in their complaints that they had no chance to respond, Justice White held that the District Court erred in dismissing for failure to state a claim.

The Supreme Court of 1985 remanded *Cleveland* for further proceedings. Now, the petitioner requests that the Supreme Court of 2006, standing foursquare on *Agliata, Brissett, Cole* and *Raftery* as the controlling cases chosen by the U.S. Army, remand this case for further proceedings. Restoration of discovery for the original court-ordered period of three months and a total revision of the military agency's biased administrative record to allow evidence from both sides to be included will uphold the standard of equal justice of process guaranteed by the U.S. Constitution.

CONCLUSION

For the foregoing reasons, the petition for review should be granted.

Respectfully submitted,

Elizabeth Mason Frothingham
Petitioner *pro se*
1521 Webster Street. N.W.
Washington D.C., 20011
(202) 248-3290

October 27, 2005

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
July 29, 2005

No. 04-2513
CA-04-82-1

ELIZABETH MASON FROTHINGHAM

Plaintiff - Appellant

v.

DONALD H. RUMSFELD, in his official capacity as Secretary of the United States of America; CARL W.S. CHUN, in his official capacity as Director of the Army Board for Correction of Military Records for the United States Army; PETER SCHOOMAKER, in his official capacity as Chief of Staff for the United States Army; LES BROWNLEE, in his official capacity as Acting Secretary for the United States Army; THOMAS J. ROMIG, in his official capacity as Judge Advocate for the United States Army; STEVEN MORELLO, in his official capacity as General Counsel for the United States Army; PAUL T. MIKOLASHEK, in his official capacity as Inspector General for the United States Army

Defendants - Appellees

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc and motion to hold petition for rehearing and rehearing in abeyance was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc and motion to hold the petition for rehearing and rehearing en banc in abeyance is denied.

Entered for a panel composed of Judge Motz, Judge King and Judge Duncan.

For the Court,
/s/ Patricia S. Connor

CLERK

APPENDIX B

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 04-2513

ELIZABETH MASON FROTHINGHAM

Plaintiff - Appellant

versus

DONALD H. RUMSFELD, in his official capacity as Secretary of the United States of America; CARL W.S. CHUN, in his official capacity as Director of the Army Board for Correction of Military Records for the United States Army; PETER SCHOOMAKER, in his official capacity as Acting Secretary for the United States Army; LES BROWNLEE, in his official capacity as Acting Secretary for the United States Army; THOMAS J. ROMIG, in his official capacity as Judge Advocate for the United States Army; STEVEN MORELLO, in his official capacity as General Counsel for the United States Army; PAUL T. MIKOLASHEK, in his official capacity as Inspector General for the United States Army,

Defendants -- Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Gerald Bruce Lee, District Judge (CA-04-82-1)

Submitted: April 27, 2005 Decided: May 19, 2005

Before MOTZ, KING, and DUNCAN, Circuit Judges

Affirmed by unpublished per curiam opinion

Elizabeth Mason Frothingham, Appellant Pro Se. Dennis Carl Barghaan, Jr., Assistant United States Attorney, Ralph Andrew Price, Jr., OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c)

PER CURIAM:

Dr. Elizabeth Frothingham appeals the district court's order granting defendants' motion to dismiss and motion for summary judgment in her civil action in which she alleged constitutional violations and violations of the Administrative Procedure Act in the denial of her claim for benefits under a military pension survivor benefit annuity. We have reviewed the record and find no reversible error. Accordingly, we affirm on the reasoning of the district court. See Frothingham v. Rumsfeld, No. CA-04-82-1 (E.D. Va. Nov. 18, 2004). We also deny Frothingham's motion for oral argument. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

DR. ELIZABETH FROTHINGHAM LAMMERS,	)	
Plaintiff,	)	
v.	)	CIVIL ACTION
	)	NO. 04-82
DONALD RUMSFELD, Secretary of Defense, et al.,	)	
Defendant.	)	

FINAL JUDGMENT

THIS matter is before the Court on Defendants Donald Rumsfeld, Carl W. S. Chun, Peter Schoomaker, Les Brownlee, Thomas J. Romig, Steven Morello, and Paul T. Mikolashek's Motion to Dismiss and for Summary Judgment. In its previous Memorandum Order of November 17, 2004, the Court granted Defendants' Motion to Dismiss and for Summary Judgment.

From foregoing, it hereby

ORDERED that JUDGMENT is ENTERED in favor of Defendants Donald Rumsfeld, Carl W.S. Chun, Peter Schoomaker, Les Brownlee, Thomas J. Romig, Steven Morello, and Paul T. Mikolashek and against Dr. Elizabeth Frothingham Lammers.

The clerk is DIRECTED to ENTER JUDGMENT pursuant to Federal Rule of Civil Procedure 58.

The Clerk is directed to forward a copy of this Order to Counsel.

Entered this 17th day of November, 2004.

/s/

Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
11/17/04

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

DR. ELIZABETH FROTHINGHAM LAMMERS,	)	
Plaintiff,	)	
v,	)	CIVIL ACTION
	)	NO. 04-82
DONALD RUMSFELD, Secretary of Defense, et al.,	)	
Defendant	)	

MEMORANDUM ORDER

THIS matter is before the Court on Defendants Donald Rumsfeld and other's Motion to Dismiss and for Summary Judgment. Plaintiff Dr. Elizabeth Frothingham Lammers was denied her claim for a military pension survivor benefit annuity, and she is suing the defendants, various United States officials, in this official capacities, for violations of her Due Process rights under the Fourth and Fifteenth Amendments of the United States Constitution and the

Administrative Procedure Act for their failure to provide payments to her under the statutory survivor benefit plan. See 10 U.S.C., Sections 1447-55 (2004). Dr. Elizabeth Frothingham Lammers and Retired Colonel William Henry Lammers were granted a divorce on November 1, 1994. Col. Lammers died before the New York court could issue a decree dividing marital property. Thus, at the time of her application for the survivor benefit annuity, Dr. Elizabeth Lammers was not a "spouse" or designee of the late Col. Lammers' survivor benefit annuity. There are two issues before the court: (1) whether Plaintiff Dr. Elizabeth Frothingham Lammers is permitted to sue United States Army officials in their official capacities for violation of her Due Process rights in light of the Supreme Court's decision in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), and (2) whether the Army Board for Correction of Military Records' denial of Dr. Elizabeth Frothingham Lammers' request to correct records to list her as a surviving spouse was "arbitrary and capricious, an abuse of discretion, or otherwise contrary to law." 5 U.S.C., Section 706(2)(a)

The Court dismisses Dr. Frothingham Lammers' claims against Army officials in their official capacity because of the Supreme Court's decision in *Bivens* and its progeny, holding that officials are not liable for money damages in their official capacity for Constitutional torts. This Court grants summary judgment for the defendants as to the APA claim because Dr. Frothingham Lammers established no dispute of material fact for trial, and Defendants are entitled to judgment as a matter of law since the Army's evaluation of Dr. Lammers' marital status in its review of her claim for survivor benefit payments did not violate the APA. Alternatively this Court lacks jurisdiction to entertain this claim because it is an attempt to involve this Court in a property distribution proceeding that belongs in state, not federal, court.

I. BACKGROUND

Plaintiff Dr. Elizabeth Frothingham Lammerss ("Dr. Frothingham Lammers," "Plaintiff") married Col. William Lammers ("Col. Lammers") on December 17, 1977. In 1978, Col Lammers turned sixty and became eligible both for military retired pay and to participate in the Survivor Benefit Plan[1] ("SBP"), a statutory benefit program available to former members of the military receiving retired pay. *See* 10 U.S.C.., Section 1447-55. Defense Finance and Accounting Services ("DFAS") record demonstrate that Col. Lammers elected to participate in the SBP, setting aside portions of his retired pay to fund an annuity that would benefit his survivors upon his death.

Col. Lammers subsequently filed for divorce against Dr. Lammers in the New York Supreme Court for New York County.[2] On November 1, 1994, New York Supreme Court Justice Lewis Friedman issued an order in the divorce suit stating:

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[1]The Survivor Benefit Plan was established by statute, and it allows individuals who receive "retired pay" to set aside a portion of it on a monthly basis to establish an annuity for the benefit of a relative upon the member's death. 10 U.S.C., Sections 1448, 1452. "Retired pay" is a monthly payment that individuals who have served in the military for a given amount of time are entitled to after retirement. *Id.* Upon that member's death, the eligible beneficiary will receive payments as required under the statute. *Id.*; 10 U.S.C., Section 1450.

[2]The Courts exercising appellate jurisdiction over the New York Supreme Court for New York County include the Appellate Division for the First Department, the relevant intermediate appellate court, and the New York Court of Appeals, the state court of last resort. *See* Mem. Law Supp. Mot. Dismiss Summ. J. at 13-14.

> it is ADJUDGED, that the marriage between William Lammers, Plaintiff, and Elizabeth Frothingham Lammers, defendant, is dissolved by reason of the constructive abandonment of plaintiff by defendant for a period of one or more years and the cruel and inhuman treatment of plaintiff by defendant; it is further ORDERED AND ADJUDGED, that [defendant] is authorized to resume use of her maiden name.

Admin. Record at 174-176. The order did not include any kind of property distribution.[3] *Id.*

On May 3, 1995, Col. Lammers provided a copy of this decree to DFAS and sought to reinstate the wife he was married to prior to marrying Dr. Lammers, "Eleanor." In a letter by Col. Lammers referencing a phone conversation that Col. Lammers had with a DFAS employee, Col. Lammers relates that he was told he would have to remarry Eleanor to designate her as his statutory beneficiary. Admin. Record at 177. The Administrative Record is silent as to whether the annuity payments under the SBP were ever disbursed to Eleanor.

Col. Lammers died in September 1998, before the New York court completed its consideration of property distribution issues relating to Col. Lammers and Dr. Frothingham Lammers' divorce.

After she did not receive annuity payments following Col. Lammers' death, Dr. Frothingham Lammers wrote to DFAS asserting that she was Col.. Lammers "surviving spouse" and SBP beneficiary, since only the first half of the divorce proceeding was complete at the time. The Army Board for

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[3]New York domestic relations law allows for bifurcated divorce proceedings in which a court may first decide whether to grant a divorce, and then, in a separate proceeding consider issues of property division and issue a final judgment. N.Y. Dom. Rel. Law, Section 236 (McKinney 2003)

Correction of Military Records ("ABCMR") compiled an administrative record and ruled on Dr. Lammers' petition on February 7, 2003. After Dr. Frothingham Lammers' submission of new evidence, the ABCMR issued another opinion on July 1, 2004. In both cases, the ABCMR denied Dr. Frothingham Lammers' request to receive payments under the SBP as Col. Lammers "surviving spouse." In essence, ABCMR concluded that Dr. Frothingham Lammers was not married to Col. Lammers at the time of his death and refused her petition.

ABCMR noted that New York Domestic Relations Law, section 236 allows for bifurcated divorce proceedings, but concluded that "there is nothing in section 236 that would support a finding that a New York court must issue both a final decree of divorce and a final order of equitable distribution before the marital status of the parties is dissolved or terminated." Admin. Record at 157 Furthermore, it noted that the Comptroller General had,

> [I]n at least one case, recognized a state court order that was entered subsequent to the death of the retiree in order to designate the former spouse at the SBP beneficiary. If the applicant [Dr. Frothingham Lammers] obtained such an order from the New York Court having jurisdiction over the divorce proceeding, she would have one year from the date of that order to request a deemed election for former spouse SBP.

Dr. Frothingham Lammers, a pro se plaintiff, file a complaint in the Eastern District of Virginia on January 28, 2004. An amended complaint was filed on July 19, 2004. The Court takes Plaintiff's complaint to allege violation of her constitutional Due Process rights and of the APA.[4]

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[4]Dr. Lammers writes that she believes that the federal court is "the appropriate forum in which to seek relief" because rights provided in its Preamble, and due process rights protected by the Fifth and Fourteenth Amendments of the Bill of Rights ..." Am. Compl. at 12-13.

Plaintiff seeks reversal of the ABCMR decision regarding her SBP annuity payments and an award of retroactive payments back to September 1998. Defendants are now seeking dismissal of Dr. Lammers' Due Process claim and summary judgment on the APA claim.

II. DISCUSSION

A. Standard of Review

A Federal Rule of Civil Procedure 12(b)(6) motion should not be granted unless it appears beyond a doubt that plaintiff can prove no set of facts in support of his claim that would entitle him to relief. FED. R. CIV. P.12 (b)(6); *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). In considering a Rule 12(b)(6) motion, the Court must construe the complaint as a whole, and take the facts asserted therein as true. *Mylan Labs, Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993). Conclusory allegations regarding the legal effect of the facts alleged need not be accepted. *See Labram v. Havel*, 43 F.3d 918, 921 (4th Cir.1995). Because the central purpose of the complaint is to provide the defendant "fair notice of what the plaintiff's claim is the grounds upon which it rests," the plaintiff's legal allegations must be supported by some factual basis sufficient to allow the defendants to prepare a

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She also states that,

> [g]pvernance of the Armed Forces of the United States is controlled by federal laws and regulations enacted by the federal government and recorded as Tit'e 10 in the United States Code. These laws include the regulation of military Review boards so that they process applications in a timely, fair and equitable manner. Id. at 13.

Furthermore, Dr. Lammers writes that "the ABCMR decision as well as the decision of the L egal Office and Bill Tyminski, Director of Retired Pay Operations at DFAS were arbitrary, capricious, unsupported by evidence and contrary to law." *Id.* at 15.

fair response. *Conley*, 355 U.S. at 47.

Under Rule 56(c), the Court must grant summary judgment if the moving party demonstrates that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *See* FED.R. CIV.P. 56(c). In reviewing a motion for summary judgment, the Court views the facts in a light most favorable to the non-moving party. *See Anderson v. Liberty, Inc.* 477 U.S. 242, 255 (1996). Once a motion for summary judgment is properly made and supported, the opposing party has the burden of showing that a genuine dispute exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. *Anderson*, 477 U.S. at 248. "Rule 56(e) requires the nonmoving party to go beyond the pleadings and by [his] own affidavits, or by the 'depositions, answers to interrogatories, and by admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp., v. Catrett*, 477 U.S. 317; 324 (1986).

B. Analysis

Violation of Due Process of Law Claim

This Court dismisses Dr. Frothingham Lammers' Due Process claims against federal officials in their official capacity because they are barred from *Bivens* and its progeny. In *Bivens*, the Supreme Court held that a plaintiff could seek money damages from federal officials in their individual capacity for violation of his Fourth Amendment

rights. 403 U.S. at 389. The Court delimited this holding in *Federal Deposit Insurance Co. v. Meyer*, 510 U.S. 471 (1994) concluding that, although a federal agent could be sued as an individual under *Bivens* for violations of rights arising under the Constitution, a federal agency could not be held liable for damages. *Id.* at 486. The Fourth Circuit took Meyer to stand for the proposition that, a "*Bivens* action does not lie against either agencies or officials in their official capacity." *Doe v. Chao*, 306 F.3d 170, 184 (4th Cir. 2002), *aff'd*, 540 U.S. 614 (2004) (emphasis in text) citing Meyer, 510 U.S. at 484-86; *see Piccone v. Moatz*, 136 F. Supp. 2d 525, 529 (E.D.Va. 2001), *aff'd*, 25 Fed. Appx. 950 (Fed Cir. 2001) ("*Bivens* claims are not actionable against the United States, federal agencies, or public officials acting in their official capacities"). Because Dr. Frothingham Lammers asserts her claim for violation of Due Process rights under the Constitution against federal officials acting in an official capacity, her suit must be dismissed.

APA Claim: Summary Judgment for the Defendants

The Court grants summary judgment against the plaintiff on her APA claims because there is no genuine dispute of material fact for trial as to whether ABCMR's actions were "arbitrary and capricious, an abuse of discretion, or otherwise contrary to law," *see* U.S.C., Section 706(2)(A) because Dr. Frothingham Lammers was not a "spouse" at the time of the late Col. Lammers' death. Alternatively, this court lacks jurisdiction too hear this claim. Under the APA, when a district court reviews final agency action, it is to "(2) hold unlawful and set aside agency action, findings, and conclusions found to – (A) arbitrary, capricious, an abuse of discretion, or otherwise not in according with law." *Id.* The Court declines to set aside the ABCMR's decision to deny Dr. Frothingham Lammers' petition to receive annuity payments under the SBP because no genuine question of

material fact for trial exists and ABCMR's decision did not fall into any of these prohibited categories.

The statutes governing the SBP specify that the primary beneficiary of annuity payments is the "surviving spouse" of the former service member. 10 U.S.C., Section 1450(a)(1). A "surviving spouse: is a "widow or widower," and a "widow" includes a person who is "the surviving wife of a person who, if not married to the person at the time he became eligible for retired pay – (A) was married to him for at least one year immediately before his death..." 10 U.S.C., Section 1447(9) and (7). The statute does not, however, define the meaning of the word "wife." While Dr. Frothingham Lammers asserts that she was still Col. Lammers' wife at the time of his death since only half of bifurcated divorce had taken place, the ABCMR found that she was not his wife because the New York court involved in her divorce had already entered a decree dissolving the marriage and allowing Dr. Frothingham Lammers to commence using her maiden name.

Because New York law is not conclusive as to whether Dr. Frothingham Lammers' was Col. Lammers wife at the time of his demise, the Court finds that ABCMR was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. (See 5 U.S.C., Section 706(2)(A). The Appellate Division for the Third Department has held that "[i]n the absence of a final judgment awarding equitable distribution, a finding of divorce is not effective," meaning that the appellate court had no jurisdiction to hear an appeal. *Sullivan v. Sullivan*, 571 N.Y.S. 2d 154 (N.Y. App. Div. 1991); accord *Blaise v. Blaise*, 614 N.Y.S. 2d 779, 780 (N.Y. App.. Div. 1994); *Busa v. Busa*, 609 N.Y.S. 2d 452 (N.Y. App. Div. 1994). However, the Appellate Division for the Fourth Department disagrees wholeheartedly with the Third Department's approach, instead allowing appeals from trial court decisions granting divorce before equitable distribution has occurred. *See Zack*

v. Zack, 590 N.Y.S.2d (N.Y. App.Div.1992). The Lammers' divorce proceedings took place in the Appellate Division for the First Department, which, like the New York Court of Appeals, had not yet ruled on this question. Given this muddled legal state of affairs combined with the divorce court's decision to grant the divorce in 1994,[5] the ABCMR's ruling not to grant annuity payments to Dr. Frothingham Lammers because it found the Dr. Frothingham Lammers was not Col. Lammers' wife at the time of his death was not arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.

APA Claim: No Jurisdiction to Decide the "APA Claim"

Alternatively, this Court concludes that it is without jurisdiction to decide the APA claim in this case because, although Dr. Frothingham Lammers styles her claim as one for violation of the APA, in essence she is asking the Court to distribute marital property in the wake of an unfinished divorce. It is traditionally the province of state courts to decide questions of domestic relations law. *See, e.g., Raftery v. Scott*, 756 F.2d 335, 343 (4th Cir.1985) (noting that state courts are "particularly vested" with domestic relations

---

[5]That opinion stated:

> It is ADJUDGED, that the marriage between William Lammers, Plaintiff, and Elizabeth Frothingham Lammers, defendant, is by reason of the constructive abandonment of plaintiff by defendant for a period of one or more years and the cruel and inhuman treatment of plaintiff by defendant; it is further ORDERED AND ADJUDGED, that [defendant] is authorized to resume the use of her maiden name.

Admin. Record at 174-76.

jurisdiction). The Fourth Circuit in *Diaz v. Diaz*, 568 F.2d 1061 (4th Cir.1977), held that a district court should have abstained from any assertion of jurisdiction when a wife attempted to subject her husband's federal retirement and disability benefits to payments for alimony and child support before obtaining a state court decree entitling her to such payments. *Id.* at 1062. The Fourth Circuit determined that the district court was being asked to involve itself in "domestic relations matters...wholly inappropriate for resolution in a federal form." *Id.* Similarly, in this case, Dr. Frothingham Lammers is asking this court sitting in the Eastern District of Virginia to involve itself in a matter of New York domestic relations laws unresolved by that state's court of last resort, as well as to make a property distribution ruling. For reasons stated in Fourth Circuit's opinion in *Diaz*, this Court abstains from doing so. *See Id.*[6]

---

[6]Furthermore, it appears that Dr. Frothingham Lammers may be able to pursue her action to be deemed the beneficiary of Col. Lammers' annuity by proceeding against Col. Lammer' estate in a New York court. In *Agliata v. Agliata*, 589 N.Y.S.2d 236 (N.Y. Sup.Ct. 1992), the Supreme Court for Erie County held that the estate of a deceased plaintiff in a divorce proceeding could proceed with its efforts to obtain a final divorce including equitable distribution even though the plaintiff died after t he court decided to grant the divorce but before final judgment and equitable distribution occurred. *Id.* at 240. As the ABCMR noted in its decision, the DFAS pointed out to Dr. Frothingham Lammers that "the Comptroller General had, in at least one case, recognized a state court order that was entered subsequent to the death of the retiree in order to designate the former spouse as the SBP beneficiary." Admin. Record at 157. Furthermore, "if the applicant obtained such an order from the New York court having jurisdiction over the divorce proceeding, she would have one year from the date of that order to request a deemed election for former spouse SBP." *Id.* In order words, it seems that Dr. Frothingham Lammers may have recourse in the court of the state where the divorce action took place.

III. CONCLUSION

Because Dr. Frothingham Lammers sued the various defendants in their official capacity, this Court dismisses her claims for violation of her Due Process rights under *Bivens* and its progeny. As to the APA claim, this Court holds that no genuine dispute of material fact exists for trial, and the ABCMR's denial of her claim for survivor benefit annuity was not "arbitrary and capricious, an abuse of discretion, or otherwise contrary to law," and in the alternative, this Court lacks jurisdiction to hear this claim. 5 U.S.C., Section 706 (2)(A); *see Diaz*, 568 F.2d 1061.

For the foregoing reasons, it is hereby

ORDERED that Defendant's Motion to Dismiss and for Summary Judgment is GRANTED.

The Clerk is directed to enter a separate Rule 58 judgment order and to forward a copy of this Order to counsel of record.

ENTERED this 17th day of November, 2004.

Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
11/17/04

APPENDIX D

EXCERPT

SUMMATION – PLAINTIFF by MARK S. HELWEIL, Esq.

OFFICIAL TRANSCRIPT
FOR DIVORCE JURY TRIAL
Lammers v. Lammers, Index No. 64037/91

in petitioner's *Memorandum of New Evidence*,
filed with her Amended Complaint – July 19, 2004

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – CIVIL TERM – PART: 11

WILLIAM LAMMERS, PLAINTIFF

-against-

ELIZABETH FROTHINGHAM LAMMERS, DEFENDANT

Index No. 64037/91

60 Centre Street
New York, New York
10/4/94

895 (continued)

BEFORE:

HONORABLE LEWIS R. FRIEDMAN, Justice

APPEARANCES:

MARK S. HELWEIL, ESQ.
Attorney for the Plaintiff
369 Lexington Avenue
New York, New York 10017

ELIZABETH FROTHINGHAM LAMMERS
Appearing pro se
RR # 1 Liscomb
Nova Scotia, Canada B0J 2A0
c/o M/M HUBLEY (902) 779-2246
(Not present)

MARY ELLEN RAFTERY, CSR, CM
OFFICIAL COURT REPORTER

MARY ELLEN RAFTERY – OFFICIAL COURT REPORTER

transpired in this case?

Credibility is very important. Is that witness reliable? Can you rely on his statements?

Remember the thing that the judge has said to you more than one, many times in this case, he said my opening statement is not evidence, Mrs. Lammers' opening statement is not evidence, questions that one poses to a witness is not evidence. Therefore, you have not heard any evidence from Mrs. Lammers. You have not heard anything from Mrs. Lammers. Her questions, her

910 (continued)

comments, her opening statement is not evidence. The only evidence that you've heard in this case, that you have to base your decisions upon, is the testimony of Mr. Lammers.

And remember as I stated to you on voir dire, I believe at least some of you, if you believe one witness's testimony, and I think I gave the analogy to a crime occurring in Yankee Stadium,...

MARY ELLEN RAFTERY – OFFICIAL COURT REPORTER

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DR. ELIZABETH FROTHINGHAM LAMMERS,	)	
	)	
Plaintiff,	)	
v.	)	CIVIL ACTION
	)	NO. 04-2513
DONALD H. RUMSFELD, Secretary of Defense, et al.,	)	
	)	
Defendant.	)	

AMENDED MOTION
TO REQUEST ORAL ARGUMENT

Pursuant to Rule 34 for appellate procedure for Oral Argument, the appellant, proceeding ***pro se***, hereby respectfully submits this Amended Motion to Request Oral Argument for the following reasons:

1. On Wednesday, February 16, 2005, I met personally with Julie Hall, my case worker at the Court office at 6000 Main Street, Richmond, Virginia. She informed me that litigants,

proceeding ***pro se*** in the United States Court of Appeals, are never granted the opportunity to present Oral Argument to present Oral Argument themselves. If Oral Argument is granted, a ***pro se*** litigant has to hire professional counsel to perform this task.

2. Desirous of qualifying as the exception to this rule, I present the following reasons for your consideration:

> **[Background:** Omitted from my Brief is the fact that my two sons are grand-nephews of the late John D. and Blanchette Rockefeller, III. In the Court Record, I present this relationship with a Graph on page 520, Exhibit C: Part I: **Rockefeller, Hooker and O'Malley family tree]**

A. MOOT COURT LAW SCHOOL PREPARATION: Second–year full-time student at Cardozo School of Law, Yeshiva University, for January semester, 1992. One of the most heavily funded students, both loans and scholarships.

Because the Moot Court course dealt with the nuts-and-bolts of standing on my feet and defending a legal position, it was my favorite course. I spent a great deal of time practicing for the Final Examination, scheduled after the Spring Break, with my assigned class partner.

I submit to this Court that this type of law school preparation is not typical of the litigants who proceed ***pro se*** at the United States Court of Appeals.

B. PSYCHIATRIC HOSPITAL PREPARATION: Intercepted by the USA Border Guards on instructions of Colonel Lammers re: false allegations. Drugged

> and thrown inside a hospital as an involuntary patient when I was driving to New York City for Moot Court exams on March 30, 1992. *(AR at 030)*

On June 2, 1992, the day of the Hearing, someone prevented my paid lawyer, Clarence Gratto, Esq. from representing me. The hospital did not appoint another lawyer in his stead. I was alone, on my own, with no knowledge of mental health laws. I had the experience of presenting my own case with absolutely no preparation. Not a note before me!

I dominated this Hearing with repeated references to the Rockefeller Family and shocking examples of the educational child abuse inflicted by members of this prestigious, powerful family and their in-house lawyers upon my two sons. *(AR at 144-152)*

I lost at the Commitment Hearing. Acting Judge Kathleen M. Rogers ordered my long-term involuntary "retention" because, being homeless, she considered me a danger to myself. However, as soon as I started to file my Notice of Appeal to involve a wider audience, the heretofore locked hospital doors opened wide to release me. Two nurses drove me 450 miles south to Rhinebeck, New York. They asked me never to return to upstate St. Lawrence County.

> [**Background**: Due to this 48-day lock-up, I missed all my second-year law school exams at Cardozo, including three required courses where the Final Exams in spring 1992 covered both semesters. The Dean of Students kindly asked me to withdraw temporarily until the divorce proceeding was final.
>
> As the divorce proceeding extended to 1998, all my successfully completed first year courses were null &

void in terms of credit. Five years is the "withdraw" limit in New York State. Thus, through no fault of my own, my promising law career ended in dismal failure.

C. ORAL ARGUMENT EXPERIENCE:
At the Appellate Division: First Department
in New York City

On March 13, 1996, I presented Oral Argument before the five judges at the Appellate Courtroom for the First Department located at 27 Madison Avenue in Manhattan. Prior to this date, I had spent many hours observing lawyers engaged there in Oral Argument.

The Supreme Court (lower court) had forced me into an abject state of court-ordered indigency. I proceeded ***in forma pauperis*** from the gutters of New York City. Yet, my presentation at Oral Argument conformed strictly to the Court Rules. One could argue only a specific point of law.

I kept my composure when the five judges permitted attorney Mark S. Helweil, Esq. to engage in a combative verbal assault that certainly did not address a point of law. He consumed his entire 10-minute allotment of time with spurious allegations about my character, completely out of order in this public forum. During my remaining 5-minute reply, I observed the rules of the court and only expanded on my single point of law. I had the presence of mind to let attorney Mark S. Helweil rant on. Thus, he destroyed the "confidentiality" of the divorce case and placed it in the public domain before witnesses in the reserved "public section."

D. ORAL RESESNTATION AS BOOK ANALYSIS:

> **[Background: "The Glue Pot Doctrine"**
> No one loved the transcript of my Commitment Hearing more than Mark S. Helweil, Esq., replacement attorney for Colonel Lammers (FSM) in the divorce proceeding. If Mr. Helweil could have used the commitment transcript to wall-paper courtroom #412, assigned to Judge Friedman, I surely would have found him there, glue pot in hand.] *(AR at 029)*

Again and again, Mark S. Helweil, Esq. burdened his legal papers with the weight of the full 148-page transcript. Instead of concluding the divorce with a court decision on the issues of equitable distribution, he chose to shame and humiliate me in this manner, even as I sought to care for my dying mother and to find a way to end the divorce case.

In desperation, I wrote an analysis of the Commitment Hearing transcript. Featuring the topics of Professionalism, Legal Ethics and Fund-Raising, I organized my raw material around 20 vignettes, of which 10 were Rockefeller related. Then, I submitted this copyrighted book, as Exhibit A of my Order to Show Cause to the divorce court in April, 1998. It was titled Exhibit A: Abuse of Court Power. *(AR at 027)* I mailed copies to "Jay" Rockefeller and The Rockefeller Family Office in New York City. I never received any objection. *(AR at 029, Note 8)*

I submit to this Court that this type of juggling by a *pro se* litigant is unusual. First, one ball tossed into the air as my own lawyer in the "nut" case contrived by public administrators of New York State on a rigged issue of "homelessness;" then second, another ball thrown higher in the air as writer/analyst of this same Commitment Hearing who organized a 316-page book manuscript, hastily

composed inside the leaky plaster walls of my deteriorating Victorian house, devoid of water, basic plumbing or heat in Liscomb, Nova Scotia, Canada. (1997)

The performance level of this juggling feat requires a mental agility in the composition of substance and then the imposition of a coherent format design on the rough text of the transcript that is beyond the literary range of most ***pro se*** litigants who request Oral Argument.

D. LEGAL TRAINING "in the rough":

After Colonel Lammers, represented by Derek A. Wolman, Esq., filed a petition against me as an alleged Incompetent Person on August 15, 1986, I became a "sitting duck" target for those lawyers interested in making a 'killing" off the wife who Colonel Lammers held up to public scrutiny as crazy.[6] *(AR at 111)*

Months away from receiving my Ph.D. from New York University, this academic accomplishment was no deterrent to dampen the legal frenzy that erupted in my life. Eight civil cases and three appellate-level appeals, including Key Bank of Southeastern New York and a legal "whiz kid," recently graduated from Harvard Law School, whose definition of "deep pockets" was conceptually flawed!

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[1]The administrative record of the ABCMR agency includes this explanation about how Col. Lammers' and Mr. Wolman initated the incompetency proceeding: "To bring a petition for the appointment of a conservator for a mentally incompetent individual, the court requires a psychiatric report as preliminary proof of the alleged incompetency... [H]e (Col. Lammers) used as his sole piece of evidence, my mother's medical record ... A false medical report with my name incorrectly placed on it had been subject to tampering, with the intent to make it more reliable – a better fit. Since I had never fainted, the word 'fainting' was changed to 'thinking' disorder." (AR at 108, 109, 111)

The objective of the Incompetency Proceeding was to take control of all my pre-marital properties that attorney Wolman valued at $460,000.

[See: www.privatelist.com Click "listings," click "NS" as in Nova Scotia and scroll to "Eastern Shore."]

[**Background**: Alas, the exercise in "manifest destiny" failed. The Hon. Kenneth Shorter ordered Colonel Lammers to pay for his own psychiatric test and submit a report to the Court. Refusing to do so, Colonel Lammers caused this case, described formally as "abuse of process" and "malicious prosecution," to collapse.] (AR at 108-111)

These "fall-out" years between 1986 and 1990 provided my early lessons of legal experience on my feet, akin to a kindergarten level of schooling in the law, where I knew neither the language of the professional nor the procedures of the court.

F. ORAL PRESENTATION IN CANADIAN COURTS OF LAW:

On August 21, 1009, I defended my case, ***pro se*** speaking the French language, against La Reine Plaignante. Having researched the Napoleonic Code, I won this criminal case in Baie Comeau, Quebec.

In addition, I initiated a civil case against a slum realtor who sought personal gain by cheating a homeless man with no resources. Again, I was on my feet, proceeding ***pro se***, at the Queen's Court in Saint John, New Brunswick, Canada, in the late spring of 1994.

While I won all the cases in New York State until October 31, 1994,[2] these legal experiences in a foreign country are more significant in terms of training me for Oral Argument. *(My Brief at 9 and AR at 033)*

I submit to this Court that this range of experiences as a bi-lingual, pro se litigant qualifies as unique training to prepare me to be "the exception to the rule."

CONCLUSION

FOR THE FOREGOING REASONS, I most humbly request that this Court make an exception to its present rule that bans litigants, proceeding ***pro se***, from participating in Oral Argument and grant me the privilege of being scheduled on your Court calendar for Oral Argument.

Respectfully submitted,

_____

Dr. Elizabeth Frothingham Lammers
Plaintiff – Appellant, ***pro se***

Date: February 19, 2005
cc: Ralph Andrew Price, Jr.

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[2]On October 31, 1994, Judge Friedman issued his order that immediately cut off all my monthly financial support and medical assistance. *(See* Petition for Writ of Certiorari: *Sub-statement, page 9)*

APPENDIX F

OMITTED PAGE

Foreword: "Allegiance to Duty"
in
petitioner's Memorandum of New Evidence

submitted to
ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

in her Amended Complaint - July 19, 2004

Let me begin my presentation of New Evidence by expressing my deepest respect for the U.S. Army and all the branches of the Armed Services.

During World War II, my father served in the U.S. Coast Guard off the coast of Massachusetts. My uncle flew fighter planes deep behind enemy lines in Burma as a Major in the U.S. Air Force. My grandfather, Andrew N. Rebori, FAIA, carried out architectural assignments for the Great Lakes Naval Training Station near Chicago and for undisclosed military installations in the Midwest.

Growing up, I was in awe of the judgment and standard of principle expressed by two U.S. colonels. Col. Houston L. Whiteside, a West Point graduate, was the brother of my mother's Aunt Ada. Col. Robert R. McCormick, publisher of *The Chicago Tribune*, counted my grandfather among his dearest friends. He commissioned him to design the original

First Division Museum at Cantigny, his estate in Wheaton, Illinois.

I admired all these men for their sense of integrity and forthright expression. Their word was their bond. Therefore, I approach my Request for Reconsideration with an appreciation of what it means to maintain allegiance to duty. They would not want me to waiver.

The Army Board for Correction of Military Records and I are united in a common cause: to ascertain the truth. The Army Board must uphold the laws and standards of the U.S. Army.

For my part, I have the responsibility to present the facts about a specific, complex divorce proceeding, no matter how long it takes.[1] To do less would be to abandon my job to provide a fair and honest record of these events.

If I have fulfilled my duty as an advocate for the truth, my Reinstatement as a former surviving spouse in an incomplete divorce proceeding will follow as a natural consequence.

Elizabeth Frothingham Lammers
Spanish Ship Bay, Liscomb, NS

August 31, 2003

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[1]Only this page did defendant Carl W.S. Chun, director of the ABCMR, decide to omit from the petitioner's 146-page *Memorandum of New Evidence*. He included all the other 145 pages in his agency's official administrative record ("AR") submitted to the District Court on September 30, 2004.

(2)

No. 05-537

In the
Supreme Court of the United States

DR. ELIZABETH MASON FROTHINGHAM,
Petitioner

v.

DONALD H. RUMSFELD,
Secretary of the United States, et al.,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR REHEARING

ELIZABETH MASON FROTHINGHAM,
Petitioner pro se

1521 WEBSTER STREET, N.W.
WASHINGTON, D.C., 200112
(202) 248-3290

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PETITION FOR REHEARING

Pursuant to Rule 44.2 of the Rules of this Court, the petitioner, Elizabeth Mason Frothingham (Lammers) proceeding *pro se*, respectfully moves this Court for an order (l) vacating the denial of her petition for a writ of certiorari, entered on December 12, 2005, and (2) granting that petition. This petition for rehearing is filed within the 25-day period required by Rule 44.2.

GROUNDS FOR REHEARING

The grounds for requesting this rehearing are intervening circumstances of a substantial and controlling effect as well as substantial grounds not correctly presented.

ARGUMENTS

I. The Grant of Certiorari in *Marshall v. Marshall*, Docket No. 04-544 (Ninth Circuit), Scheduled for Argument on February 28, 2006, Warrants Rehearing and Certiorari in this Instant Case.

This Court has granted certiorari to *Marshall*, a case that raises the same technical issue of jurisdiction and whether to grant defendant Pierce's motion to dismiss. Both *Marshall* and this instant case request the intervention of this Court to clarify the scope of federal jurisdiction.

In *Marshall*, the uncertainty of the "probate exception" is held up for scrutiny by this Court. In this instant case, the "domestic relations" exception is examined due to the Fourth Circuit's overly broad inclusion of the petitioner's tort claim in fraud as grounds for granting the defendants' ("U.S. Army's") motion to dismiss.

In *Marshall*, petitioner Vicki asserted that the Ninth Circuit decision takes the "probate exception into uncharted waters by applying it to divest a federal court of the plenary bankruptcy jurisdictions conferred by Congress..."

In this instant case, the petitioner is the irrevocable beneficiary of a military insurance annuity, known as the survivor benefit plan (SBP). Her case raises no domestic dispute with Col. Lammers who died on September 22, 1998. Rather her claim in tort is brought against the U.S. Army. As administrator of this insurance policy issued in 1978, its is bound by the Title 10 federal laws that created and now control this survivor benefit.

Both *Interco Inc. v. Mission Insurance Company*, 808 F.2d 682 (8th Cir.1987) and *Sheppard v. Allstate Insurance Co*, 21 F.3d, 1010 (10th Cir.1994) rule that the law of the state where the contract is issued controls the substantive rights of the parties. In this instant case, the laws of the federal government that govern the U.S. Army, are located in the state of Virginia. Federal in nature, they control the petitioner's substantive rights.

The petitioner seeks no issuance of a divorce, alimony or child custody decree, the parameters of the "domestic relations" exception established by this Court in *Ankenbrandt v. Richards*, 112 S.Ct. 2206,

504 U.S. 689 (1992). Her claim in tort applies only to this survivor insurance benefit where Col. Lammers voluntarily elected her as his sole beneficiary.in 1978. The U.S. Army refuses to reverse its policy cancellation.

Furthermore, when the U.S. Army cited *Estate of Agliata v. Agliata*, 589 N.Y. 2d 236 (Supp. 1992), 155 Misc.2d 385 (3rd Dept.) as its controlling case in this instant case, it verified the vested nature of the petitioner's insurance benefit that it could not lawfully cancel. After Col. Lammers died, this SBP vested absolutely. As the petitioner's private property, it was guaranteed protection by the Fifth and Fourteenth Amendments and was eligible, as a claim in tort, for federal diversity jurisdiction.

Therefore, this instant case also flounders in the same uncharted waters as *Marshall*. Its claim in tort lies far beyond the accepted *Ankenbrandt* "domestic relations" exceptions, including a request for the federal court to issue divorce, alimony or child custody decrees.

The close relationship between the technical question of jurisdiction in *Marshall* and this instant case has been presented in petitioner Vicki's *Brief on the Merits* filed with this Court on November 21, 2005. [This petitioner filed her petition for a writ of certiorari in this instant case on October 27, 2005. She had no knowledge of its similarity with the *Marshall* case regarding the technical issue of jurisdiction.]

To prove that this Court's "modern decisions" demonstrate that there is federal jurisdiction of the *Marshall* case, petitioner Vicki relied upon the "domestic relations" exception, as described in the tort

action between diverse parties in *Ankerbrandt*. She refers to the "domestic relations" exception as "cognate doctrine" that encompasses only cases involving the issuance of a divorce, alimony, or child custody decree. Also, no proceeding was pending in any state tribunals. The syllabus summarizes the opinion of Justice White:

> Because this lawsuit in no way seeks a divorce, alimony, or child custody decree, the Court of Appeals erred by affirming the District Court's invocation of the domestic relations exception.

This Court has established that a tort claim in *Ankenbrandt* compelled federal jurisdiction. Both *Marshall*, now before this Court, and this instant case between diverse parties that merits a rehearing with reversal of the denial of a writ of certiorari, qualify for federal jurisdiction.

Marshall relies upon *Ankenbrandt* to "exclude from federal jurisdiction only the narrowest band of cases." Likewise, this instant action relies upon *Ankenbrandt* for the same broad acceptance of tort cases between diverse parties that lie outside the narrow interpretation of those cases that qualify for the "domestic relations" exception.

TIAA/CREF, a major pension company, paid the petitioner her survivor pension immediately, starting October, 1998. Likewise, the SBP survivor benefit administered by the U.S. Army, requires no divorce court intervention to reverse its arbitrary, secret ruling against the sole beneficiary claimant.

II. The Motion to Dismiss, based upon Federal Rule 12 (b)(1), is the Only Question Regarding Federal Jurisdiction that the Petitioner should have Presented to this Court.

The Federal Rule 12 (b)(1) governs the lack of subject matter jurisdiction. It states that "a motion making this defense shall be made ***before*** pleading if a further pleading is permitted." (*emphasis added*)

In conformity with the progression standard established by this Court in *Bell v. Hood*, 66 S.Ct. 773, 327 U.S. 678, the petitioner should have confined her petition for a writ of certiorari solely to the technical issue of the legitimacy of federal subject matter jurisdiction for her claim in tort with damages.

Therefore, the opening of the petition, under the heading, **Questions Presented**, should be revised to read **Question Presented**. Question 1 becomes the only question to be considered by this Court:

> **1. Whether the affirmation of the Fourth Circuit is in direct conflict with past decisions rendered by the Fourth Circuit, giving rise to inconsistency and confusion where the stability and settled expectation of case law precedents regarding the jurisdictional issues of its "domestic relations" exceptions should prevail.**

Questions 2 and 3 address the merits of the case and are relevant for consideration only *after* this Court decides the jurisdictional issue in favor of the petitioner's quest

for federal jurisdiction and then remands this case to the district court where the merits of her claim in tort will be adjudicated.

In *Solomon v. Solomon*, 516 F.2d 1018, the court ruled that the lack of subject matter jurisdiction should be raised and adjudicated by a motion to dismiss, not by a motion for summary judgment, as confirmed by the Federal Rule 12 (h)(3) that distinguishes the motion to dismiss from the motion for summary judgment only after the court has granted jurisdiction and denied the motion to dismiss.

At the District Court of Oklahoma, where Chief Judge Kern presided over *Carlson v. U.S. Ex.Rel.U.S. Postal Service*, 248 F.Supp.2d (N.D. Okla 2003), he labeled the motion to dismiss as a harsh remedy.

> The motion here is of the second form a factual challenge. Therefore, the Court will consider evidence beyond the pleadings where necessary. As granting a motion to dismiss is a harsh remedy, it must be cautiously studied, both to effectuate the spirit of the liberal rules of pleading and to protect the interests of justice. *See Cottrell, Ltd. v. Biotrol Int'l Inc.*, 191 F.3rd 1248, 1251 (10th Cir. 1990).

The motion to dismiss was granted in *Rabinowitz v. New York*, 329 F.Supp.3rd 373 (E.D.N.Y.2004). Brought in federal court, this case involved a parental challenge to custody. The court granted the motion to dismiss in this lawsuit because it fell within the "domestic relations" exception. The federal district declined to

re-examine and re-interpret all the evidence regarding custody arguments that the parties had brought before the state court in this proceeding.

In contrast to the court's dismissal of the *Rabinowitz* case, *Thomas v. New York City*, 814 Fed. Supp. 1139, presented a challenge to the states' procedure used to separate a parent from a child by raising constitutional due process requirements. Here, the motion to dismiss was denied because the district court determined that adjudicating this dispute did not entail any investigation by the federal court regarding (1) fitness of the parent or (2) issuance of any custody decree regarding reunification of the parent with the child. The case satisfied the mandate that it must present a federal question.

Rather than rushing precipitously to the Federal Rule 12 (b)(6) and the U.S. Army's premature motion for summary judgment in this instant action, the District Court should have firsts decided the issue of jurisdiction as required by Federal Rule 12 (b)(1). Since the District Court ruled that the petitioner's case failed to meet the standards for federal jurisdiction of subject matter, it should have abstained from addressing any of the issues on the merits. There was no need for Judge Gerald B. Lee ("Judge Lee") to proceed further with the formulation of his *Memorandum Order* wherein he discussed issues other than federal versus state jurisdiction in light of the "domestic relations" exceptions. (Pet. Writ, Appendix C, 5a-18a)

The procedural confusion that arises from a federal court attempting to decide a lawsuit both on the challenge to jurisdiction as well as on the merits for summary judgment is set in correct order in *Magee v. Nassau County Medical Center*, 27 Supp.2d (E.D.N.Y. 1998).

Here, the court knew that it first had to face the motion to dismiss for lack of subject matter jurisdiction first. Its decision stated that if the court decides to dismiss the motion for lack of subject matter jurisdiction, then the "accompanying defenses and objections become moot and do not need to be determined.

In his *Memorandum Order*, Judge Lee relied upon the use of "alternatively" to describe a lateral relationship between the U.S. Army's motion to dismiss and the U.S. Army's motion for summary judgment. (Pet. Writ, Appendix C, 16a). In fact, the relationship of one federal procedure, known as 12 (b)(1), to another procedure, known as 12 (b)(6), is hierarchical in nature.

Therefore, based upon these substantial grounds for procedural order, only petitioner's Question 1 was suitable for presentation to this Court in her Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

Petitioner's Question 2 addressed her claim as the irrevocable beneficiary of the U.S. Army insurance annuity benefit, known as SBP. As such, it concerned the merits of the case if and when this case was remanded to district court where subsequently it would decide the U.S. Army's motion for summary judgment in compliance with the federal procedural rules of discovery, originally had been subverted by the U.S. Army at the district court level.

Petitioner's Question 3 addressed her claim that the U.S. Army had seized her vested private property without due process as guaranteed by the Fourteenth Amendment. This question, too, prematurely raised an issue on its merit before this Court's ruling on the extremely important